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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NATHANIEL ROSE, Plaintiff and Respondent. v. ZENOBIA MCMILLON et al., Defendants and Appellants,	D074791 (Super. Ct. No. 37-2017-00004433-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Zenobia McMillon et al., in pro. pers., for Defendants and Appellants.

No appearance for Plaintiff and Respondent.

Defendants Zenobia McMillon (sometimes, Zenobia) and Kavin McMillon (sometimes, Kavin), appearing in propriae personae as they did in the trial court, appeal

the judgment for plaintiff and respondent[1] Nathaniel Rose (sometimes, Nathaniel), attorney-in-fact for, and the son of, Willie M. N. Kirby (sometimes, Willie or Mrs. Kirby) (Nathaniel and Willie sometimes collectively, plaintiff) following a two-day bench trial. The court in its statement of decision found that Zenobia, the niece of Willie, and Zenobia's husband Kavin committed financial elder abuse of Willie pursuant to Welfare and Institutions Code[2] section 15610.30, subdivision (a)(1) and (2) by wrongfully appropriating and retaining Willie's personal and real property; that in so doing, defendants acted in "bad faith" within the meaning of Probate Code section 859, entitling plaintiff to "twice the value of the property recovered . . . in addition to any other remedies" provided by law; and that plaintiff therefore was entitled to an award of $834,415.83.

On appeal, defendants have neither challenged the statutory basis of the award nor its amount. They also have not challenged the costs and attorney fees awarded plaintiff.

Instead, they contend the court erred (1) in finding that Zenobia wrongfully sold Willie's real property; (2) in failing to advise them at the conclusion of plaintiff's case-in-

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1 Plaintiff has not filed a respondent's brief. This, however, does not absolve us of adjudicating the merits of defendants' appeal. (See *In re Bryce C.* (1995) 12 Cal.4th 226, 232–233 [noting "[i]f an *appellant* fails to file a brief, the appeal may be dismissed entirely," but "if the respondent fails to file a brief, the judgment is not automatically reversed"]; see also *Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 55 [noting that, although some courts treat the failure to file a respondent's brief as consent to reversal, the "better rule . . . is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found"].)

2 All further statutory references are to the Welfare and Institutions Code unless noted otherwise.

chief on whether they should invoke their respective Fifth Amendment rights, and the impact of their decision to invoke such rights; (3) in failing to address the alleged misconduct, and the lack of credibility, of plaintiff and plaintiff's counsel; and (4) in failing to remain impartial during the proceedings.

As we explain, we reject each of these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL OVERVIEW[3]

Nathaniel testified cousin Zenobia called him in July 2016 and reported Nathaniel's mother Willie "wasn't doing too good," as she was eating "food that was spoiled, and that she just couldn't take care of herself." Before this call, Nathaniel had never spoken to Zenobia, as Nathaniel at the time was living in Memphis, Tennessee, and Zenobia and her husband Kavin were living in Bakersfield, California. Willie then was residing in her own home located on Lisbon Street in San Diego (Lisbon Property), with other family members including her grandson, who had informed Zenobia of Willie's condition after Willie had fallen in her home. Willie was the sole owner of the Lisbon Property, which she had lived in for about 40 years. After speaking with Zenobia, Nathaniel called Willie. Nathaniel testified his mother "spoke pretty good" during their conversation, and he felt a sense of relief.

Sometime in September, Nathaniel received a call from Debra, Willie's best friend of over 40 years. Debra reported Willie was not doing well. Debra suggested Nathaniel

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3 "We do not review the evidence to see if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party." (See *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245.)

fly to San Diego, check on his mother, and take over her affairs including her business, as Willie had "been in real estate for 40 years" and had "sold many pieces of property." Because he lived "2000 miles away" and Zenobia, during their July conversation, had offered to be of service to the family, Nathaniel called Zenobia, who lived only "250 miles away." Nathaniel asked Zenobia if she would be willing to travel to San Diego and check on Willie. Zenobia agreed, and she and Kavin went to San Diego a few days later.

Willie's condition continued to deteriorate. As a result, Nathaniel testified he agreed that defendants could take Willie to defendants' home in Bakersfield, California. Nathaniel thus entrusted Willie's care to defendants, who admitted they became Willie's "caregivers." Nathaniel had no conversation or agreement with defendants regarding compensation for taking care of Willie.

Later in September, Willie "suffered a sudden, significant decline in health." After conferring with Nathaniel, Zenobia called 911. Willie was admitted to a Bakersfield hospital, after doctors determined she needed surgery to address internal bleeding caused by a brain injury (i.e., as a result of her earlier fall). Surgery was scheduled for September 24, 2016.

On or about September 20, Zenobia obtained, with Nathaniel's permission, a California Durable Power of Attorney over Willie's finances (sometimes, Power of Attorney), and a California Power of Attorney for Health Care for Willie. On the *same* day of Willie's surgery (i.e., September 24), Zenobia—without explanation—used the Power of Attorney to execute a quitclaim deed transferring Willie's sole and separate interest in the Lisbon Property, to Willie and Zenobia as joint tenants. The quitclaim

deed was recorded on October 17. Zenobia gave no consideration for her receipt of an interest in the Property, as the quitclaim deed stated this transfer was a "gift." Nathaniel testified he then was "totally unaware" of the quitclaim deed, as his mother awaited a surgery she was not expected to survive.

Nathaniel testified that, when Zenobia executed the quitclaim deed on September 24, six of Willie's children (including himself) were alive, and Willie then knew "very little about" her niece Zenobia. Although Zenobia at some point told Nathaniel about the quitclaim deed, she never provided him with a copy.

Willie survived the surgery. A few weeks later, Nathaniel testified that he and his sister visited their mother in Bakersfield; that as Willie recovered from surgery, her mind "was coming back"; that Zenobia refused to turn over documents Willie had executed just prior to surgery, despite Nathaniel's belief his mother then was "strong enough" to review them and had asked to see them; and that when Nathaniel questioned his mother about the documents including the quitclaim deed, Willie could not recall signing any such documents, as her "thoughts [were] not clear."[4]

Nathaniel testified that shortly before her September 24 surgery, Willie "was really not able to make any decisions"; that she was "just very up and down"; and that "[i]t was really bad for her during that time." However, Nathaniel estimated at trial that "99 percent [of Willie's] mind ha[d] come back," and that "most family members," including Zenobia, "didn't expect for [Willie] to come back." As Willie regained her health and her

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4 Much of the testimony in this case was admitted without objection by the parties.

mind "c[a]me back," Nathaniel testified that his mother stopped listening to Zenobia and the various doctors Zenobia was taking her to two or three times per week, all of whom were telling Willie she had dementia.

In early December 2016, Nathaniel returned to Bakersfield to pick up Willie and take her back to Tennessee. At the time of trial, Willie was living with her daughter in Tennessee. Nathaniel testified his mother then was "doing really good"; she was well-cared for by his loving sister; and he was managing his mother's affairs. Nathaniel further testified neither he nor his sister received any money to care for their mother, with the exception that Willie provided some financial assistance with food and "stuff like that" to offset some of his sister's expenses. Once back in Tennessee, Nathaniel hired a local attorney, who helped Nathaniel obtain a power of attorney for his mother. Nathaniel then hired a San Diego-based attorney to prosecute the instant case against defendants.

Nathaniel testified that shortly before Willie left for Bakersfield, she withdrew $50,000 from her bank account, which money was to be used to pay off her mortgage on the Lisbon Property. Willie then gave the $50,000 cashier's check to Zenobia, with the understanding that Zenobia would make such arrangements, as Willie at some point intended on returning to San Diego and resume living in the Lisbon Property.

Zenobia, however, did not use the $50,000 to pay off the mortgage on the Lisbon Property. Nathaniel testified when he and his sister visited Willie at defendants' Bakersfield home a few weeks after Willie's surgery, he saw a "big Black SUV in [defendants'] yard with a drive-out tag on it." Shortly before his visit, Zenobia had

informed Nathaniel that she had removed the carpet in two hallways and replaced it with some "beautiful cherry wood Pergo" in order to make it easier for Willie to walk to the bathroom.

Regarding the sale of the Lisbon Property, Nathaniel testified he encouraged Willie to sell because of its "condition." Nathaniel instructed defendants to place the sale proceeds from the Lisbon Property in a trust for Willie. Nathaniel and one of his siblings, along with defendants, at one point met the listing agent of the Lisbon Property. However, Nathaniel did not receive, nor did he have access to, any of the documents connected to the sale of the Lisbon Property.

After the sale of the Lisbon Property to good faith purchasers, Kavin called Nathaniel and asked for the addresses of some of Nathaniel's siblings. Kavin then explained defendants intended to send each of them a gift of $10,000 from the proceeds of the sale of the Lisbon Property. Nathaniel testified, "So I'm driving and I spoke to [Kavin] on my car phone, and I said well, you know, you don't—I felt you're not supposed to be giving my mom's money away. And I asked them for the money when the house was sold and they said well, look, we've decided that we're going to keep the money here as long as your mom was with us. We're not going to give you the money like I had asked them to do before the house was sold."

After the sale of the Lisbon Property, Zenobia stopped taking Nathaniel's calls. Concerned, Nathaniel started calling Kavin, who "sometimes" would answer. Although he was worried about the money from the sale of the Lisbon Property, particularly after being informed by defendants they intended to retain it as long as Willie was under their

care, Nathaniel testified that he did not immediately demand an accounting from defendants because his first priority was his mother, and to remove her from defendants' home.

Nathaniel noted that as time went on, he became concerned for Willie's welfare while in defendants' care. This concern grew when defendants began "monitoring every call" the family made to Willie, thereby preventing the family from having open communication with Willie. Nathaniel came to believe defendants were "controlling" the information given to, and about, Willie. Willie by this time also no longer felt comfortable in defendants' care.

Using the Power of Attorney, Zenobia opened a bank account ending in 8835, naming her and Willie as the account holders. On or about November 10, 2016, there was $45 in that account. On November 17, escrow wired the sale proceeds from the Lisbon Property, $263,796.73 (sometimes, sale proceeds), into account 8835.

Nathaniel testified that in early December 2016 when he picked up Willie from defendants' home, Willie had in her possession an envelope containing a $20,000 cashier's check; that she "wanted to go straight to the bank to see if her money was there"; and that they found only about $1,700 remained in account 8835. Willie withdrew the remaining funds and closed the account.

Bank records show a series of withdrawals from account 8835 on November 17, the *same* day the money from the sale of the Lisbon Property was deposited into the account. These include: an $80,000 transfer to an account ending in 3404; a $20,000 transfer to an account ending in 1600; a $4,700 cash withdrawal; and a $44,080 transfer

based on a "Customer Withdrawal Image." The *next* day, the same bank records showed a $502.50 transfer from account 8835 to "Safe 1 Credit Uni[on]"; a $44.01 debit from a grocery store; a $5,000 transfer to an account ending in 6000; and a $4,885 transfer again based on a "Customer Withdrawal Image."

Three days later, there was a $100,000 transfer from account 8835 to an account ending in 3404, leaving a balance of only $4,667.72 in account 8835. Thus, between November 17 and November 21, including the $45 that was initially in the account, defendants transferred more than $259,000 out of account 8835. Bank records further showed a $2,000 cash withdrawal from said account on November 22, and thereafter, a series of additional cash withdrawals and/or debit purchases, leaving an available balance of $1,658.12 in the account as of December 2.

As noted, Nathaniel testified he and certain of his siblings each received a $10,000 cashier's check from defendants. Nathaniel testified he did not authorize defendants to distribute this money, and that he and one of his sisters returned this money to their mother. Nathaniel also testified he never gave defendants the authority to make any of the other transfers and/or distributions from account 8835, nor did he know about such transfers and/or distributions until long after they had been made by defendants. He also did not authorize Zenobia to keep any of the money (i.e., $50,000 and $13,000 cashier's checks) Willie had given her. In fact, Nathaniel testified that Zenobia "never discussed money with [him] at all."

Plaintiff expert witness Jeffrey Porter, a forensic accountant, testified he reviewed various bank statements, including from defendants, and prepared compilations based

thereon. Porter confirmed that the proceeds from the sale of the Lisbon Property, $263,796.73, were wired into account 8835 on November 17; that account 8835 was opened on November 9 with a $700 check, which bank records showed had "bounced"; that the *same* day the proceeds from the sale of the Lisbon Property were deposited into account 8835, defendants made several large transfers from that account including in amounts of $80,000 and $20,000 via online banking transfers; that between November 17 and December 5, defendants transferred $263,849.63 out of this account; that defendants used the money in account 8835 for "personal expenditures" and to pay outstanding debts, including overdue income and property taxes; that "day after day after day" defendants spent the money in account 8835 until they had "whittl[ed]" it down to "nothing"; and that, based on the "number of accounts and the movement of the money immediately out of an account in the joint name to an account in their own separate names," defendants attempted to "conceal[]" or "obfuscate" their expenditure of the sale proceeds from the Lisbon Property.

Willie, aged 84 at the time of trial, also testified. Willie stated she then was living with her daughter in Tennessee; that she was testifying because defendants "stole" her money and she wanted it back; and that she had not wanted her Lisbon Property sold, as she had lived in the home for almost 40 years and planned to return living there once she "got well." Willie also stated that before going to live with defendants, she and friend Debra went to the bank, where Willie withdrew $50,000; and that Willie in turn gave Zenobia a $50,000 cashier's check to pay off the mortgage on the Lisbon Property,

adding: "I had all my house almost paid for. . . . [¶] I wanted to stay in my home until I died."

While being cared for by defendants, Willie asked Zenobia for an accounting of the proceeds from the sale of the Lisbon Property. Zenobia, however, refused to provide one, and also refused to give Willie any documentation regarding the sale, despite Willie's repeated requests for such. Willie added that while in defendants' care, they were "disrespectful to [her] in every area"; talked to and treated her "like [she] was [a] dog" and a "criminal"; gave her no privacy whatsoever, even preventing her from speaking to her pastor and refusing to allow her to use a telephone; and told her and others including family members that she (i.e., Willie) was "crazy" and therefore, they (i.e., defendants) refused to talk to her about her finances, despite her repeated attempts to do so.

While living with defendants, Willie on several occasions attempted to walk to the bank where account 8835 had been opened, which branch, she stated, was located just around the corner from where she lived. According to Willie, defendants and/or their children stood "guard" and refused to allow her to leave defendants' home. As a result, Willie asked defendants' neighbors to "call the police." The neighbors refused, telling Willie they did not want to get "involved."

Defendants also refused to take Willie back to San Diego before escrow closed on the Lisbon Property. Willie testified she wanted to return to San Diego to retrieve "personal papers and stuff" from her home. After the Lisbon Property sold, Willie testified everything she had owned was gone, including personal items. Other than Social Security, at trial Willie stated she had no other source of income.

Willie also testified that she never agreed to pay defendants to provide her care, and never agreed defendants could spend or distribute any of her money. Willie recognized her signature on the deed transferring the Lisbon Property to good faith purchasers, but stated Zenobia had her sign the documents before her mind "came back." Willie reiterated she had wanted to die in the Lisbon Property, where she had lived for about 40 years, then give the Property to her surviving children. Willie never intended Zenobia or her husband to receive any portion of her estate, nor did Willie make any sort of "gift" to Zenobia, noting: "I didn't give her [i.e., Zenobia] nothing."

The record shows at the conclusion of the evidence, the court ruled from the bench. The court found that the case was "straightforward"; that while caring for Willie, defendants "took $13,000," then "$50,000," and finally the proceeds from the sale of the Lisbon Property; that defendants then gave some of Willie's children each $10,000 in an attempt to "keep . . . [them] . . . from complaining too much," which was "unfortunate, but . . . just part of [their] scheme"; that defendants committed financial elder abuse as defined by statute; and that defendants used Willie's money to "subsidize[] their life-style," "pa[y] off credit cards," "taxes," and buy "things," leaving a "trail of gutting the account of the plaintiff."

The court further found that defendants took $326,796.73 from Willie, "returned, so to speak, $48,658.12, leaving a balance that was taken from the plaintiff of $278,138.61"; that defendants' acts were "deliberate" and "in bad faith against an elder or dependent adult, committed willfully through the commission of financial abuse" for purposes of Probate Code section 859; and that as such, the court awarded Willie as

principal $556,277.22, *in addition* to the money defendants had wrongfully taken from Willie.[5] The court asked plaintiff's counsel to prepare a proposed statement of decision, which, after objection, it filed on May 9, 2018 (hereinafter, SOD).

The court in the SOD confirmed the factual findings it had previously made from the bench.[6] The court also ruled that defendants committed financial abuse of Willie, an elder, under section 15610.30, subdivision (a); that, in addition to being liable for wrongfully taking and retaining Willie's money, defendants were separately liable under Probate Code sections 4231.5, subdivision (c), and/or 859, for what it found was defendants' bad faith conduct; and that plaintiff therefore was entitled to an award of $834,415.83.

The court in its SOD also awarded plaintiff costs of $15,851.09, and found plaintiff was entitled to reasonable attorney fees under section 15657.5, subdivision (a). The record shows the court subsequently awarded plaintiff $96,905.50 in attorney fees pursuant to this statute.[7]

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5 As noted *ante*, defendants on appeal do not challenge the statutory basis of the award or its amount.

6 The court via separate minute order found there was a "typographical error" in the SOD regarding the amount defendants had wrongfully taken from Willie, as the correct amount was $278,138.61, as it orally pronounced, and not $278,183.61, as provided in the SOD.

7 As also noted, defendants on appeal have not challenged either the costs or attorney fees awarded plaintiff.

DISCUSSION

A. *Defendants' Burden on Appeal*

" 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) " 'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Ibid.*)

On appeal, a party must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court,[8] rule 8.204(a)(1)(B).) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeited]. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 (*Badie*).) The brief must also include appropriate citations to the facts in the record. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.) "Because '[t]here is no duty on this court to search the record for evidence' [citation], an appellate court *may* disregard any factual contention not supported by a proper citation to the record [citation]." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.)

We recognize defendants are self-represented, as they were in the trial court. Nonetheless, their propriae personae status does not exempt them from the rules of

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8 All further rule references are to the California Rules of Court.

appellate procedure or relieve them of their burden on appeal. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 (*Rappleyea*); see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 (*Nwosu*) [noting self-represented litigants "must follow correct rules of procedure" and their failure to do so forfeits any challenge on appeal].)

As part of their appellate burden, defendants were obligated to provide a statement of facts in their opening brief in conformance with rule 8.204(a)(2)(C), which requires a "summary of the significant facts limited to matters in the record." Under this rule, defendants were required to summarize *all* the evidence presented during the two-day bench trial. (See *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260 (*Silva*).)

We have read the entire appellate record in this case. Defendants' version of the facts in their brief is decidedly one-sided, in contrast to that record. Their summary also omits many, if not most, of the key facts on which the court relied in finding defendants acted in "bad faith" in committing financial elder abuse against Willie, including, most glaringly: that defendants had received, and had no right or entitlement to retain, the $13,000 and $50,000 cashier's checks drawn from Willie's personal bank account, the latter of which was to be used to pay off the mortgage on the Lisbon Property; and that defendants had no right or entitlement to any of the proceeds from the sale of the Lisbon Property, which had been wired into account 8835 that Zenobia had opened using the Power of Attorney.

Nor do defendants in their statement of facts mention that it was Zenobia who *first* contacted her cousin Nathaniel in July 2016 to report Willie "wasn't doing too good," after Willie had fallen; that Zenobia, during this July conversation, had offered to be of

service to the family, which led Nathaniel in September 2016 to call on her after learning from Willie's long-time friend Debra that Willie's medical condition had worsened; that on the date of Willie's surgery she was not expected to survive, Zenobia used the Power of Attorney to execute *without consideration* a quitclaim deed transferring title in the Lisbon Property from Willie's sole and separate property to Zenobia and Willie as joint tenants, despite the fact Willie had never intended either defendant to be a beneficiary of her estate, and despite the fact Willie then had six surviving children; that despite the repeated requests of Nathaniel and Willie, defendants thereafter refused to provide any documentation regarding the sale of the Lisbon Property, including any bank statements or escrow documents, not only while Willie was under their "care," but after Willie left their home and went to live in Tennessee with her daughter;[9] that when Kavin called and asked for the addresses of Nathaniel's siblings, Nathaniel responded defendants were "not supposed to be giving [Willie's] money away"; that the court specifically found defendants gave $10,000 "gifts" of Willie's money to certain of Willie's children as part of defendants' "scheme" to keep Willie's children "from complaining too much" about

9 The record shows plaintiff moved in limine to exclude any evidence defendants might seek to introduce at trial, based on defendants' utter failure to respond to discovery, produce documents, and/or appear for deposition, leading plaintiff to file *eight* motions to compel. It further appears shortly before trial defendants finally produced "very few documents" in connection with their court-ordered depositions, after being sanctioned by the court.

how defendants were spending Willie's money; and that Nathaniel and one of his siblings returned the $10,000 "gift" to their mother.[10]

As is evident, defendants in their brief failed to set forth all material evidence, as opposed to " '*merely* [*their*] *own evidence*.' " (See *Nwosu*, *supra*, 122 Cal.App.4th at p. 1246, quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Fallon*); see also *Schmidlin*, *supra*, 157 Cal.App.4th at p. 738 [requiring a party in summarizing the evidence to include both favorable *and* unfavorable facts].) Thus, to the extent defendants claim a particular finding by the court is not supported by sufficient evidence, that claim is forfeited if it is based on defendants' one-sided summary of the facts. (See *Fallon*, at p. 881; *Nwosu*, at p. 1246.)

In the interests of justice, as best as we are able we turn to the merits of defendants' contentions on appeal. (See *Silva*, *supra*, 7 Cal.App.5th at p. 261.)

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10 Candidly, this is merely the tip of the proverbial iceberg. Of particular significance in this case, defendants in their factual summary stated Willie suffers from dementia, relying in part on a doctor's report and Willie's inability at trial to identify Zenobia as her niece, as opposed to Zenobia the person. We note from the record the doctor's report was from October 20, 2016, or 26 days after Willie's brain surgery. In this follow-up report, the doctor noted Willie's "power of attorney" (i.e., Zenobia) stated Willie was "experiencing significant memory difficulties," and listed as one of his "impressions" that Willie had "[c]erebral vascular disease with atrophy and dementia." What defendants do *not* say in their factual summary, however, is that as time went on, there was substantial evidence to show Willie's mind "came back," as Willie testified and as corroborated by her son Nathaniel. (See Rule 8.204(a)(2)(C); see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 (*Schmidlin*) [recognizing that a " 'party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence on* that point, *favorable and unfavorable*, and *show how and why it is insufficient*,' " or risk having the claim of error forfeited on appeal].) As demonstrated by the SOD, the court, as was its right as trier of fact, found Willie competent and relied in part on her testimony in resolving the case. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629–630 (*Howard*).)

B. *Standard of Review*

On appeal from a judgment based on a statement of decision after a bench trial, we review the trial court's conclusions of law de novo and its findings of fact for substantial evidence. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) Moreover, when, as here, the trial court has resolved a disputed factual issue, we apply the deferential substantial standard of review; "[i]f the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

In applying the substantial evidence standard of review, " 'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 (*Baldwin*).)

"The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial. [Citation.]" (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

In conducting a substantial evidence review, "[i]t is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact." (*Howard*, *supra*, 72 Cal.App.4th at p. 630.) We also do not evaluate the credibility of the witnesses; rather, "we defer to the trier of fact on issues of credibility. [Citation.]" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) We affirm a judgment if correct on any ground. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.)

C. *Guiding Principles and Analysis*

Our Legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (§ 15600 et seq; Act) to protect, as relevant here, elders by providing enhanced remedies which encourage private, civil enforcement of laws against elder abuse and neglect. (*In re Conservatorship of Kayle* (2005) 134 Cal.App.4th 1, 5–6; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) As relevant here, section 15610.30, subdivision (a)(1) of the Act provides that financial abuse of an elder occurs, inter alia, when a person or entity, "[t]akes, secretes, appropriates, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud, or both." Under subdivision (a)(2) of this statute, a person who assists in the foregoing conduct is also liable.

When a plaintiff proves "by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs." (§ 15657.5, subd. (a).)

As noted, the court also relied on Probate Code section 859 in rendering its award. This statute provides, in relevant part: "If a court finds that a person has in *bad faith* wrongfully taken, concealed, or disposed of [the subject] property . . . , the person shall be liable for *twice the value of the property recovered* by an action under this part. . . . The remedies provided in this section shall be *in addition* to any other remedies available in law to a person authorized to bring an action pursuant to this part." (*Ibid.*, italics added.)

1. Sale of the Lisbon Property

Defendants contend they did not commit elder abuse because it was a "family decision" to sell the Lisbon Property, there was "no evidence" Zenobia "acted on her own in the listing and selling" of the Property, and therefore the court erred in finding she "wrongfully sold" the Property. Defendants further contend that plaintiff failed to show by "clear and convincing evidence" that Zenobia was "guilty of recklessness, oppression, fraud, or malice," citing *Delaney v. Baker* (1999) 20 Cal.4th 23, 31 (*Delaney*); that there was no evidence Zenobia "intend[ed] to cause harm to Ms. Kirby by selling the home"; and, without citation to legal authority, that this court should apply a de novo standard of review to address these alleged errors. We find these contentions unavailing.

First, the issue at trial was not whether defendants, and Zenobia in particular, had the authority to sell the Lisbon Property while caring for Willie, as the record shows Nathaniel wanted it sold because his mother was in failing health and unable to care for herself, and the Property was in disrepair. In fact, the record shows Nathaniel and his

sister participated in a meeting with defendants and a real estate agent regarding the sale of the Lisbon Property.

Instead, the key issue, which, as we have noted, defendants completely ignore on appeal, is whether Zenobia and her husband Kavin were entitled to use as they saw fit not only the $263,796.73 from the sale of the Lisbon Property, but also the $13,000 and $50,000 cashier's checks Willie had turned over to Zenobia, in order to "subsidize" their "life-style"; pay off various personal debts; purchase "things," including a car; and give Willie's money away to others, all while "caring" for Willie as she recovered from a brain surgery she initially was not expected to survive. Candidly, the issue of whether Zenobia had the family's permission to sell the Lisbon Property is a red herring and not pertinent on appeal.[11]

Second, *Delaney* is not on point, as that case involved a nursing home and its owners who were found by clear and convincing evidence to have engaged in "neglect" of an elder as defined by section 15657 of the Act, and to have also been guilty of "recklessness" in the commission of such neglect, leading to the imposition of heightened remedies under the Act including attorney fees and damages for the elder's pain and suffering. (*Delaney, supra,* 20 Cal.4th at pp. 26-27.) Our high court in *Delaney* went on to distinguish the neglect statute from those in the Act that merely applied to "simple professional negligence" (*id.* at p. 32), recognizing that the former statute was designed to

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11 The record shows Willie did not want the Lisbon Property sold, as she had wanted to "die" in that house and then distribute the Property to her surviving children. But that "issue" was between Willie and her children, including Nathaniel in particular, and had nothing to do with Zenobia's sale of the Property.

"provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults" (*id.* at p. 35); and, in particular, was enacted in part to "eliminat[e] . . . the institutional abuse of the elderly in health care facilities (*id.* at pp. 35-36).

Delaney is inapposite in the instant case. The issue presented here is whether defendants committed financial elder abuse within the meaning of section 15610.30, subdivision (a)(1) and (2). The statute at issue in *Delaney*, section 15657, including the provision allowing for heightened remedies for acts of "egregious abuse" against an elder in an *institutional* setting, clearly has no application here.

Third, although defendants, as we have discussed, forfeited on appeal any evidentiary challenge to the court's finding they committed financial elder abuse as defined in the Act (see *Fallon*, *supra*, 3 Cal.3d at p. 881; *Nwosu*, *supra*, 122 Cal.App.4th at p. 1246), our review of the record shows there is more than ample support that Zenobia, with her Power of Attorney, "[took], secrete[d], appropriate[d], obtaine[d], or retaine[d] real or personal property of an elder . . . for a wrongful use" (see §15610.30, subd. (a)(1)); and that Kavin "[a]ssiste[d]" Zenobia in such "taking, secreting, appropriating, obtaining, or retaining" property of an elder "for a wrongful use." (See *id.*, subd. (a)(2).)

There is also more than sufficient evidence to show defendants acted in "bad faith" for purposes of Probate Code section 859 in wrongfully taking and disposing of Willie's property, making them liable for "twice the value of the property recovered." (*Ibid.*)

Finally, defendants' contention that Zenobia allegedly did not "intend" to harm Willie, including by selling the Lisbon Property, is merely a request of this court to reweigh the evidence, which, as a court of review, we cannot and will not do. (See *Baldwin, supra*, 33 Cal.3d at p. 660.) In any event, as we have noted, the issue in this case was not whether defendants, and Zenobia in particular, wrongfully *sold* the Lisbon Property, but rather was their wrongful retention and use of the proceeds from that sale, and the other money Willie had given them, all of which occurred while Willie was under their "care." For this separate reason, we reject this claim of error.

2. The Court's Failure to Advise Defendants of the Impact of their Decision to "Remain Silent"

Defendants next contend the court erred as a matter of law by not "advising" them that "pleading 'the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them,' " citing *Baxter v. Palmigiano* (1976) 425 U.S. 308 (*Baxter*).

Briefly, the record shows during opening statements, plaintiff's attorney represented to the court there was an "active" criminal investigation of defendants. On questioning by the court, Zenobia stated "they" had been contacted by the Bakersfield Police Department on "December 5th," but did not provide a year. The court in response stated, "Okay, but let me just say that, you understand that you've got the right to remain silent. You've got a Fifth Amendment privilege?" to which Kavin replied, "We have nothing to hide, Your Honor." The court reiterated defendants had the right to remain silent, and noted what they said at trial "could tend to incriminate" them in a future

criminal proceeding. The record shows both Zenobia and Kavin stated they understood, and both agreed to go forward with the trial.

After Willie's testimony, summarized *ante*, plaintiff called Kavin to the witness stand. Kavin responded, " 'I'll be pleading the Fifth, so there's no point in me coming up there.' " Plaintiff then called Zenobia to the witness stand, who likewise took " 'the Fifth' " and refused to testify. The court then confirmed the decision of each defendant not to testify.

Defendants' reliance on *Baxter* in no way supports their contention that the trial court was required to "advise" them before deciding at the conclusion of plaintiff's case-in-chief whether to testify or remain silent. *Baxter* addressed whether the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, forbade drawing an adverse inference against a prison inmate for his failure to testify at a prison disciplinary hearing, after the inmate had been advised he had a right to remain silent at the hearing. (*Baxter*, *supra*, 425 U.S. at p. 316.) Because prison disciplinary hearings are not criminal proceedings, and because the applicable state law required disciplinary decisions to be based on substantial record evidence, thus making an inmate's silence in and of itself insufficient to support an adverse decision by the prison disciplinary board, the *Baxter* Court ruled under such circumstances that an adverse inference could be drawn against the inmate. (*Id.* at pp. 318–319.)

Baxter not only is factually distinguishable to the instant case, it also in no way supports defendants' contention that the trial court was obligated to give them what

amounts to legal advice regarding the significance or impact of their respective decision to invoke their Fifth Amendment rights.

Moreover, defendants' contention that the court was required to advise them regarding the implications of exercising their right to remain silent ignores the well-established rule that self-represented litigants should be treated no differently than parties represented by attorneys.

Indeed, our high court has made clear that, "mere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea, supra,* 8 Cal.4th at p. 984.) "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Id.* at p. 985.) "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys.' [Citation.]" (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.)

We conclude this well-established rule prevented the court from "advising" defendants regarding whether they should testify or remain silent at the trial. A contrary rule, as sought by defendants, would lead to a "quagmire in the trial courts" (see *Rappleyea, supra,* 8 Cal.4th at p. 985), implicate a court's impartiality to the litigants, and discriminate against litigants who have counsel of record. (See *ibid.*; see also *Jacobsen v. Filler* (9th Cir. 1986) 790 F.2d 1362, 1364–1365, fn. 7 (*Filler*) [rejecting the argument of a self-represented plaintiff that the district court had a "duty to advise him of the measures he should take to oppose the defendants' [summary judgment] motion," noting

such a rule would require a "trial court to inject itself into the adversary process on behalf of one class of litigant," which would "necessarily implicate[] the court's impartiality and discriminate[] against opposing parties who do have counsel"].)[12] We thus reject this claim of error.

3. Misconduct of Plaintiff and Plaintiff's Counsel

Defendants next contend that plaintiff (i.e., Nathaniel) engaged in "misconduct" at trial when he "contradicted himself in testimony"; that plaintiff's attorney engaged in "[p]rosecutorial misconduct" when he allegedly "withheld information until it was discovered in cross-examination"; and that such misconduct by plaintiff's counsel was not merely limited to the trial, but also occurred at a pretrial hearing when a bailiff allegedly "had to ask Counsel to sit down and lower his voice, after [the bailiff] witnessed Plaintiff's Counsel . . . standing over the defendants while waiting for Court to begin."

Initially, we note defendants failed to provide *any* detail, including record cites, regarding the alleged "misconduct" of Nathaniel during his trial testimony; or the alleged "prosecutorial misconduct" of plaintiff's counsel who, although not a prosecutor,

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12 We note in passing that defendants had other options short of remaining silent and refusing to testify at the trial. For example, before trial they could have moved for a stay in the instant case by way of noticed motion, and presented evidence showing there was a real possibility criminal charges in Bakersfield would be filed against them. (See e.g., *People ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 256–258 [noting that the failure of the plaintiff to file a noticed motion for a stay deprived the court of the "opportunity to weigh the parties' interests and make an informed decision on 'the particular circumstances and competing interests involved,' " thus requiring the plaintiff to " 'choose between asserting her Fifth Amendment privilege and risking substantial monetary jeopardy in the civil action, on the one hand, and waiving her Fifth Amendment privilege and subjecting herself to criminal jeopardy[,] on the other hand' "].)

allegedly "withheld information" during "cross-examination" of some unspecified witness or witnesses. We cannot, and will not, speculate regarding defendants' allegations of misconduct by Nathaniel and/or plaintiff's counsel. Because defendants have failed to overcome the presumption of correctness by affirmatively demonstrating prejudicial error (see *Denham, supra,* 2 Cal.3d at p. 564), we conclude this claim of error is forfeited.

Reaching the merits, as best as we are able, we conclude there was no misconduct, as described by defendants. That Nathaniel may have "changed" or "clarified" his testimony on cross-examination in one or more unspecified respects, and perhaps even explained his reason(s) for doing so on redirect, is not "misconduct," as defendants contend; rather, it is one of the " 'virtues of our system of legal justice that have grown up through the years.' " (See *Martin v. Los Angeles R. Corp.* (1946) 75 Cal.App.2d 744, 750.)

Further, and without regard to forfeiture and the rules of evidence, a bailiff telling an attorney to sit down and lower his or her voice prior to and/or during a court hearing does not constitute "prosecutorial misconduct" or "harassment," as defendants contend. And even if such conduct could be considered misconduct; and even if such a claim was properly brought and considered on appeal; we nonetheless would conclude any such misconduct was harmless. (See *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296 [noting to justify a new trial, a party must show not only attorney misconduct, but "must demonstrate that the misconduct was prejudicial," namely " ' "whether it is reasonably probable [that the appellant] would have achieved a more favorable result in

the absence of that portion of [attorney conduct] now challenged" ' "].) For these reasons, we reject this claim of error.

4. Judicial Bias

Relying on Code of Civil Procedure section 170.1[13] and claiming they were denied due process, defendants next contend the court failed to remain impartial both before and during the trial.

Defendants first complain that just a few weeks before trial, the court "provid[ed] no direction on how to procced" to remove what they claimed was an "illegal lis pendas (*sic*)" on real property owned by Zenobia located on Wandering Oak Drive in Bakersfield (sometimes, Bakersfield Property). The record shows Zenobia had listed for sale, and accepted an offer on, the Bakersfield Property shortly before the court on or about March 6, 2018 issued the right to attach order and order for issuance of writ of attachment under section 15657.01[14] in the amount of $263,000.

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13 Defendants did not identify the provision or provisions they are relying on to support their judicial bias claim. It appears to be Code of Civil Procedure section 170.1, subdivisions (a)(6)(A)(ii) [providing for disqualification if the "judge believes there is a substantial doubt as to his or her capacity to be impartial"]; and/or (a)(6)(B) [providing "[b]ias or prejudice toward a lawyer in the proceeding"].

14 This statute provides, "Notwithstanding Section 483.010 of the Code of Civil Procedure, an attachment may be issued in any action for damages pursuant to Section 15657.5 for financial abuse of an elder or dependent adult, as defined in Section 15610.30. The other provisions of the Code of Civil Procedure not inconsistent with this article shall govern the issuance of an attachment pursuant to this section. In an application for a writ of attachment, the claimant shall refer to this section. An attachment may be issued pursuant to this section whether or not other forms of relief are demanded."

This claim fails because, as we discussed *ante*, a court cannot "advise" litigants regarding the "direction on how to proceed" in a litigation, as doing so would undermine the integrity and impartiality of a judge, favoring one party over the over depending on whether the party was represented by counsel of record. (See *Rappleyea*, 8 Cal.4th at p. 985; *Filler*, *supra*, 790 F.2d at pp. 1364–1365, fn. 7.)

Defendants next claim the court was impartial during the March 2 trial readiness conference. Zenobia alone participated in that hearing, after Kavin had voluntarily left the courtroom claiming he was "not mentally stable" because plaintiff's counsel was "provoking" him. Toward the conclusion of the hearing, the court informed Zenobia that its calendar showed defendants' motion to quash—ostensibly in response to plaintiff's motion for the attachment order and writ of attachment on the Bakersfield Property—was set to be heard *after* trial. The court inquired whether Zenobia wanted to vacate the hearing date, noting the motion was "not going to do you much good after trial anyway." Zenobia agreed, and the hearing ended. Defendants on appeal claim that, because the motion to quash was vacated, it (somehow) allowed plaintiff to obtain some unspecified "bank records which impacted the final judgement (*sic*)."

This claim has no merit. As the court correctly noted, defendants' motion to quash a *pretrial* right to attach order and writ of attachment would not do "much good" if heard *after* trial. In any event, the record shows Zenobia agreed to take the quash motion off calendar, and thus any claim of error regarding *her* decision is forfeited on appeal. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166 [recognizing

the well-accepted rule that an appellant forfeits his or her right to attack error by expressly or implicitly agreeing at trial to a procedure objected to on appeal].)[15]

Briefly, defendants also claim judicial bias after the court, posttrial, denied their motion for an award of $6,347,417.80 in fees, costs, and damages, both compensatory and punitive, as a result of its earlier posttrial ruling expunging the lis pendens on the Bakersfield Property. Defendants claim the court allegedly "ridiculed" them, and showed bias in favor of plaintiff, in connection with its October 5, 2018 order denying their motion seeking such an excessive award.

This claim also has no merit. There is no evidence in the October 5 order to support defendants' claim the court ridiculed them. Instead, the record shows the court merely rejected their claim for fees, costs, and damages in excess of $6 *million*, on the heels of the finding they engaged in bad faith conduct in committing financial elder abuse against Willie, which, as we have now noted, is supported by ample record evidence. Nor do defendants cite any legal authority that supports such a claim, thereby forfeiting it on appeal. (See Rule 8.204(a)(1)(B); *Badie*, *supra*, 67 Cal.App.4th at pp. 784–785 [noting an appellant's failure to support a point raised on appeal with "reasoned argument *and citations to authority*" forfeits the point or issue on appeal (italics added)].)

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15 This claim also fails for a variety of other reasons, including defendants' failure to explain how taking their quash motion off calendar allowed plaintiff to obtain "bank records which impacted the final judgement [*sic*]"; or how they were prejudiced by the fact their motion was not heard post-trial, after the court found in favor of plaintiff and awarded plaintiff about *three times* the amount subject to the attachment order and writ of attachment.

Defendants final claim of judicial bias relates to the demeanor of the trial court during the two-day bench trial. Defendants contend the court showed bias against them by relying solely on the calculations of plaintiff's expert in determining damages, and by "rush[ing]" Zenobia during her cross-examination of the witnesses.

As noted, however, both Zenobia and Kavin took " 'the Fifth' " at the conclusion of plaintiff's case-in-chief. As further noted, they did so on their own accord, as repeatedly confirmed by the trial court, and as borne out by our own review of the record. Thus, it was not error for the court to rely on the calculations provided by plaintiff's expert in determining the money defendants wrongfully took from Willie. (See § 15610.30, subd. (a)(1).)

Moreover, the calculation of money defendants wrongfully took from Willie was relatively straightforward, as summarized *ante*, as the bank records from account 8835 showed various transactions made by defendants between November 17—the same day the money from the sale of the Lisbon Property was wired into that account—and December 2, 2016, the date of the bank statement. What defendants did with the money was for the most part immaterial, because there is no record evidence to show defendants at any time were authorized, as found by the trier-of-fact, to (i) make *any* such transfers from this account, including to themselves, their own children, and/or Willie's children, or (ii) retain the $13,000 and $50,000 cashier's checks drawn from Willie's personal bank account.

Furthermore, as we have repeatedly noted, defendants on appeal have *not* challenged the court's determination of the amount defendants wrongfully took from

Willie (see § 15657.5, subd. (a)); nor have they challenged the doubling of that amount based on the finding they acted in bad faith in committing financial elder abuse (see Prob. Code, § 859).

In any event, the record shows the court did not merely accept plaintiff's calculations in determining the amount defendants wrongfully took from Willie. To the contrary, the court repeatedly sought clarification regarding the basis of such calculations, including from plaintiff's expert; played "devil's advocate" on myriad occasions in making such inquiry; and only arrived at a final number after *reducing* it to account for certain transfers or "gifts" defendants made to one or more of Willie's children, which in some cases were returned, and for transfers to Willie herself (i.e., the $20,000 cashier's check Nathaniel found in an envelope when he picked up his mother in early December 2016).

Finally, the record shows that the court's impatience during the trial was not directly solely at defendants; that the court repeatedly interrupted plaintiff and plaintiff's presentation of the evidence, including from the expert; that the court aggressively questioned plaintiff's attorney regarding the source of the funding for the lawsuit against defendants; and that the court likewise questioned Nathaniel regarding his receipt and return of the $10,000 "gift" he had received from defendants.

For all these reasons, we reject defendants' claims of error based on judicial bias.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P.J.

WE CONCUR:

HUFFMAN, J.

IRION, J.